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17 Attorneys for Plaintiffs and Proposed Class

18 IN THE UNITED STATES DISTRICT COURT

19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 SAN FRANCISCO/OAKLAND DIVISION

21 DON C. BENNETT, COMERLIS
22 DELANEY, GARY ROBINSON,
23 DARREN SCOTT, and JON HOTZLER,
24 on behalf of themselves and all others
25 similarly situated,

Case No. C 11-1854 (PJH)

**REPLY IN SUPPORT OF PLAINTIFFS'
MOTION TO COMPEL PRODUCTION
OF COMPLETE PROJECT AND
PAYROLL DATA WITHOUT EMPLOYEE
NAMES REDACTED**

26 Plaintiffs,

27 vs.

28 SIMPLEXGRINNELL LP,

Defendants.

Hearing Date: September 25, 2012
Time: 11:00 a.m.
Judge: Nandor J. Vadas

CASE NO. 11-1854 (PJH)

REPLY ISO MOTION TO COMPEL PRODUCTION OF
COMPLETE PROJECT AND PAYROLL DATA WITHOUT
EMPLOYEE NAMES REDACTED

1 **I. INTRODUCTION**

2 Plaintiffs need the names rather than employee identification numbers in the payroll and
 3 project data produced by Defendant in order to cross-check those data entries against other
 4 information regarding specific inspections and projects that Defendant has also provided and that
 5 include employee names rather than identification numbers. Without being able to cross-check
 6 these various types of information, Plaintiffs will be hampered in their ability to analyze the data
 7 provided by Defendant and ultimately will be less prepared to move for class certification at the
 8 appropriate time or to determine whether subclasses exist.

9 However, after being made fully aware of the prejudice that Plaintiffs will suffer without
 10 the full payroll and project data including employee names,¹ Defendant is only willing to remove
 11 that source of prejudice by imposing another: an essential gag order that would prevent Plaintiffs
 12 from contacting any putative class members until an opt-out notice is sent by a third party
 13 administrator, regardless of where Plaintiffs obtain the information to contact any such potential
 14 class members. See Exh. C to Hall Decl. in Support of Defendant's Opposition, Dkt. 87-4 ("This
 15 means that Plaintiffs may not attempt to contact any of these individuals to discuss the case until
 16 completion of the *Belaire* [opt-out notice] process."). Such a restriction on contacting percipient
 17 witnesses in the midst of discovery is antithetical to the fundamental goals of civil litigation and
 18 particularly the class action process, is unsupported by any federal or California case law, and is
 19 a wholly unacceptable compromise for Plaintiffs' counsel to have to accept in exchange for
 20 receiving full discovery responses to which they were entitled in the first place. In short, the
 21 proposal offered by Defendant's counsel and recounted in Exhibit C to the Hall declaration is
 22 irrelevant; Plaintiffs' original request for the electronic payroll and project data was valid and
 23 Defendant should be required to produce that data in native, unredacted form.

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27 ¹ Contrary to its representation in the opposition brief that Defendant was not made aware of the cross-checking
 28 issue until August, Plaintiffs' counsel raised the issue for the first time in a letter dated May 2, 2012, which was
 attached as Exhibit A to the Declaration of Karla Gilbride in support of Plaintiffs' Motion to Compel.

1 **II. ARGUMENT**

2 **A. Plaintiffs' Need for the Employee Names Outweighs any Slight
3 Privacy Interest the Employees Have in this Information.**

4 Prior to class certification under Rule 23, discovery lies entirely within the discretion of
5 the Court. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) ("Our
6 cases stand for the unremarkable proposition that often the pleadings alone will not resolve the
7 question of class certification and that some discovery will be warranted."). Courts have held
8 that pre-certification discovery is warranted where it will resolve factual issues necessary for the
9 determination of whether the action may be maintained as a class action, such as whether a class
10 or set of subclasses exist. *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th
11 Cir. 1975). To deny discovery where it is necessary to determine the existence of a class or set of
12 subclasses would be an abuse of discretion. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d
13 1304, 1313 (9th Cir. 1977) (citing *Kamm*, 509 F.2d at 210).

14 Where a party asserts privacy rights under the California Constitution as a reason for
15 refusing to comply with a discovery request, as Defendant has done here, then the balancing test
16 enunciated by the California Supreme Court in *Hill v. National Collegiate Athletic Association*
17 and *Pioneer Electronics v. Superior Court*, and described in detail in Plaintiffs' Motion to
18 Compel, comes into play. When applying that balancing test, federal courts in this district have
19 found that mere names and contact information, not to mention names alone which are all that is
20 at issue here, are not particularly sensitive and thus the privacy interest is minimal. *Khalilpour v.*
21 *Cellco P'ship*, No. C 09-02712 CW (MEJ), 2010 U.S. Dist. LEXIS 43885 (N.D. Cal. April 1,
22 2010) ("In fact, the disclosure of names, addresses, and telephone numbers is common practice
23 in the class action context because it does not involve revelation of personal secrets, intimate
24 activities, or similar private information, which have been found to be serious invasions of
25 privacy.") (citing both California and federal cases).

26 Set against this marginal privacy interest are various considerations regarding the
27 importance of discovery to civil litigation in general and class action practice in particular, which
28

1 were recognized by the California Supreme Court in *Pioneer Electronics* and which courts in this
 2 district have subsequently quoted with approval:

3 In *Pioneer*, the Court found that many of Pioneer's complaining customers would
 4 be percipient witnesses to relevant defects in the DVD players, and could therefore be
 5 considered persons having discoverable knowledge and proper subjects of discovery.
 6 *Pioneer*, 40 Cal.4th at 374. The Court also found that, from the standpoint of fairness to
 7 the litigants in prosecuting or defending the class action, Pioneer would possess a
 8 significant advantage if it could retain for its own exclusive use its customers' contact
 9 information." *Id.* "Were plaintiff also able to contact these customers and learn of their
 10 experiences, he could improve his chances of marshalling a successful class action
 11 against Pioneer, thus perhaps ultimately benefitting some, if not all, those customers." *Id.*
 12 . . . Finally, the Court noted that a rule requiring an affirmative waiver from persons
 13 whose personal identifying information is sought by others "could have potentially
 14 adverse effects in cases brought to redress a variety of social ills, including consumer
 15 rights litigation." *Id.* Thus, on balance, the Court determined that discovery of Pioneer's
 16 complaining customers' contact information was permissible. *Id.*

17 Here, too, the Court finds that the balance of factors addressed in *Pioneer* weighs
 18 in favor of disclosure. Many of Defendants' complaining customers would be proper
 19 subjects of discovery given that it's possible their complaints regarding international-
 20 roaming fees are the same as Plaintiff's. Further, Defendants would possess a significant
 21 advantage if the Court allowed them to retain the contact information for their own
 22 exclusive use and benefit. On the other side, if Plaintiff were able to contact these
 23 customers, he could improve his chances of marshalling a successful class action, thus
 24 potentially benefitting some, if not all, of Defendants' customers. Finally, as stated above,
 25 many of Defendants' complaining customers would be percipient witnesses to the
 26 relevant issue - international-roaming charges, and could therefore be considered persons
 27 having discoverable knowledge and proper subjects of discovery. Thus, one would
 28 reasonably expect Defendants to have identified at least one complaining customer in the
 prospective class. That Defendants have not identified these potential class members
 suggests a possible divergence between the interests of Defendants and the interests of its
 complaining customers. This divergence further suggests that Defendants' concern about
 the privacy rights of the potential class members is actually driven more by their own
 self-interest.

29 Thus, in balancing the competing interests present here, the Court finds that the
 30 balance weighs in favor of disclosure.

31
 32 *Mcartle v. AT&T Mobility LLC*, No. C 09-1117 CW (MEJ), 2010 U.S. Dist. LEXIS
 33 47099 (N.D. Cal. April 16, 2010).

34 As in *Pioneer* and *McArtle*, the balancing test here weighs in favor of Plaintiffs because
 35 the privacy interests involved are scant and Plaintiffs' need for the information is great.

1 Specifically, Plaintiffs need the full project and payroll data to match that data against inspection
 2 reports and job summaries, which are linked to individual employees by name. This cross-
 3 checking, in turn, will enable Plaintiffs to determine which employees performed which types of
 4 work, whether that work was performed on public contracts, and whether the proper prevailing
 5 wage was paid for any such public work. These are critical questions which must be answered in
 6 order for Plaintiffs to marshall their motion for class certification or to determine whether
 7 subclasses exist. Because Plaintiffs have demonstrated a need for the information as part of the
 8 proper precertification discovery process, and because allowing Defendant to have sole
 9 possession of this information would put Plaintiffs at a severe disadvantage in litigating this case,
 10 the Court should require Defendant to produce the full payroll and project data without
 11 redactions.

12 **B. Any Concerns About the Privacy of the Employee Names or Pay Rate
 13 Information Can be Addressed Through the Existing Stipulated Protective
 14 Order In This Case.**

15 Defendant argued in its opposition brief that Plaintiff is not requesting “mere” names of
 16 putative class members because those names are linked to other confidential information about
 17 the employees’ pay rates while employed by Defendant. Those pay rates are one of the key
 18 pieces of information in this case regarding whether or not the proper prevailing wage was paid
 19 for public work, and indeed Defendant has already produced the pay data and thus cannot
 20 credibly argue that it is not discoverable. To the extent Defendant is contending that linking the
 21 pay data with the names of the employees at issue raises some heightened privacy concerns,
 22 Defendant has not been able to point to any federal or California case law supporting that
 23 position. To the contrary, a federal district court in the Central District of California has
 24 permitted billing records of credit card customers to be produced to Plaintiffs as part of
 25 precertification discovery, along with the addresses, phone numbers, and e-mail addresses of
 26 those potential class members, a far more potentially serious invasion of those individuals’
 27 privacy rights than anything being requested by Plaintiffs in this case. *See Davis v. Chase Bank*
 28 U.S.A., Case No. CV 06-04804 DDP (PJWx), 2010 U.S. Dist. LEXIS 37464 (C.D. Cal. April 14,
 2010) (requiring Chase to produce discovery relating to a sampling of 1,200 potential class

1 members, including the names, addresses, telephone numbers, e-mail addresses, and billing
 2 records for at least 150 cardholders for each year from 2002 through 2010, subject to the
 3 stipulated protective order previously entered in the case).

4 To the extent that disclosing billing records implicated greater privacy interests than mere
 5 names and contact information, the court in *Davis* found it significant that any information
 6 produced would be subject to a stipulated protective order already in place in the case. Such a
 7 stipulated protective order has been entered in this case as well, *see* Dkt. 59, and should be
 8 sufficient to address any concerns regarding the privacy or confidentiality of the information in
 9 Defendant's payroll and project data. *See Currie-White v. Blockbuster, Inc.*, No. C 09-2593
 10 MMC (MEJ), 2010 U.S. Dist. LEXIS 47071 (N.D. Cal. April 15, 2010) (in a case involving
 11 alleged violations of the California Labor Code, requiring defendant to produce names and
 12 contact information for employees at the two stores where the plaintiff worked, and at a sampling
 13 of ten other stores, subject to a protective order); *see also Putnam v. Eli Lilly & Co.*, 508
 14 F.Supp.2d 812, 814 (C.D. Cal. 2002) (ordering production of the names, addresses, and
 15 telephone numbers of putative class members, subject to a protective order, including those who
 16 worked in a sales division other than the plaintiff's own).

17 **III. CONCLUSION**

18 Because the redactions conducted by Defendant are not supported by California or
 19 applicable federal law, and because Plaintiffs have demonstrated a need for the complete
 20 unredacted data sets, Plaintiffs respectfully request that the Court order Defendant to produce
 21 electronic project and payroll data without employee names redacted. Plaintiffs further request
 22 that the Court award costs associated with this motion to Plaintiffs in accordance with Federal
 23 Rule of Civil Procedure 37(a)(5)(A).

24
 25 Dated: September 12,, 2012

Respectfully submitted,

26
 27 By: _____/s/
 28 Todd F. Jackson (SBN 202598)

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